

77-1317

Supreme Court, U. S.

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In the
Supreme Court
of the
United States

OCTOBER TERM, 1977

NO. A-686

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

vs.

LYLE KENT.

Petitioner

**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT**

DON KNUCKEY
State's Attorney
Marshall County Courthouse
Lacon, IL 61540
(309) 364-2440

JOHN B. ROE
Attorney at Law
P.O. Box 68
Rochelle, IL 61068
(815) 562-8754

Counsel for Respondent

Counsel for Petitioner

9:00 a.m. - 3:00 p.m. 2/29

INDEX TO PETITION

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	5
Manner of Raising the Federal Constitutional Question	7
Reason for Allowance of Writ	8
Conclusion	10

TABLE OF CASES

<u>Chaplinsky v. New Hampshire</u> , 315 U.S. 568, 571, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942)
<u>Speiser v. Randall</u> , 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d. 1460 (1958)
<u>Cantwell v. Connecticut</u> , 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L. Ed. 1213 (1940)
<u>NAACP v. Button</u> , 371 U.S., at 433, 83 S.Ct., at 338
<u>Gooding v. Wilson</u> , 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972)

APPENDIX

	Page
Appendix A: Opinion of the Illinois Appellate Court . . .	11
Appendix B: Letter from the Illinois Supreme Court . . .	17
Appendix C: Text of <u>Illinois Revised Statutes</u> , 1977, Chap. 56-1/2, Sec. 1404	18
Appendix D: Letter from the United States Supreme Court granting the Extension	19

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, Third Judicial District, affirming Petitioner's conviction of sale of LSD in violation of Illinois Revised Statutes, 1977, Chap. 56-1/2, Sec. 1404.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third District, is reported at App., 8 III Dec. 1, 365 NE 2nd 239 and is attached hereto and is included herein as Appendix A.

The order of the Illinois Supreme Court denying the Defendant's Petition for Leave to Appeal was entered on November 23, 1977. This order was not reported and a copy of the letter of notification is attached hereto and included herein as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

"By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

QUESTION PRESENTED

Whether it is a denial of due process of law under the Fourteenth Amendment to the United States Constitution for a Defendant to be found guilty of a Criminal Offense under State Law when in fact the only element the Statute makes unlawful which is otherwise lawful in the State of Illinois is the words uttered by the Defendant which words are protected in all other transactions by the First Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Amendment I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances,

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

III. Rev. Stat. 1977, Chap. 56-1/2, Sec. 1404, as follows:

"Except as authorized by this Act, it is unlawful for any person knowingly to deliver or possess with intent to deliver any substance

which he represents to be a controlled substance. Any person who violates this Section is guilty of a Class 3 felony. The fine for violation of this section shall not be more than \$15,000.00."

STATEMENT OF FACTS

On March 19, 1975, Carl Roberts, Kevin Harris, John Weger, and Randy Longman played "hooky" from school. Instead of attending school, they played pool in Henry, Illinois. Around noon, they met Kevin Harris' sister, Debbie Weise, who drove them to a trailer in Crescent Mobile Home Park. At the trailer park, Carl Roberts gave Debbie Weise money to purchase drugs. She went inside a trailer all alone, and returned with a package which she gave to Carl Roberts. She testified that Lyle Kent, the defendant, sold this to her, and told her it was LSD. No other witness testified to corroborate the testimony of Debbie Weise. This package was variously described as an envelope with white paper inside, a white piece of paper with erratic pencil markings, a blotter, and aluminum foil.

The four boys were then driven back to Henry by Debbie Weise. Two of the boys went inside the local hotel, and two went down to the river. Later all four rejoined and went to Randy Longman's house, then to a nearby summer home, and then to Deitsch's pasture, which was near the summer home. The boys later split up and went their own ways.

On the same day, Officer Arnold Parker met with Mr. Deitsch pursuant to a radio call from Chief Glen Killen of the Henry Police. Mr. Deitsch led Officer Parker to his pasture where a young boy was observed among the horses requesting to be kicked. The boy was later identified as John Weger. Mr. Weger was described as incoherent and uncontrollable, and was taken to a Peoria Hospital.

Lyle Kent was indicted for violating III. Rev. Stat., Chap. 56-1/2, Sec. 1404, delivery of a substance represented to be a controlled substance, on September 15, 1975, some six months after the alleged offense.

At a bench trial before the Marshall County Circuit Court on March 5, 1976, Lyle Kent was found guilty. At this trial, the defendant introduced no evidence, insisting the People had failed to prove the crime with which he was charged.

On May 5, 1976, post-trial motions were argued and denied, and the pre-sentence investigation was heard.

Lyle Kent was ordered convicted on March 5, 1976, and sentenced on May 5, 1976, to a term of not less than one nor more than three years in the penitentiary.

This appeal was then perfected by the filing of a timely notice of appeal on June 2, 1976.

MANNER OF RAISING THE FEDERAL CONSTITUTIONAL QUESTION

The constitutionality of the Illinois Statute in question was raised at the Trial and Appellate Court by unmistakeable inference and was not passed on by either the trial or Appellate Court of Illinois. The Appellate Court chose to decide the case on non-constitutional grounds and affirmed the Defendant's conviction. Illinois is the only State which has a statute of this type. An exhaustive search of the statutes of the Fifty States of the United States reveals that no other State has a statute similar to Illinois Revised Statutes, 1977, Chap. 56-1/2, Sec. 1404. This statute is a clear deprivation of the rights guaranteed all citizens of the United States by the First Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

Petitioner herein was convicted of violating a criminal law of the State of Illinois the substance of which makes the verbal misrepresentation of a sale of a non-narcotic drug an offense classified as a felony under Illinois law. No mental state is required under the law of Illinois in order to secure the conviction of an individual under this statute. Knowledge that the substance is either narcotic or non-narcotic is not required to be proven in order to sustain a conviction. The Illinois Supreme Court has never squarely faced the constitutionality of this statute. The Illinois Supreme Court has never discussed the constitutionality of this statute even in the form of dictum. The Illinois Appellate Courts have never squarely faced the constitutionality of this statute. The Illinois Appellate Courts have never discussed the constitutionality of this statute even in the form of dictum.

It is Petitioner's contention that Illinois Revised Statute, 1977, Chap. 56-1/2, Sec. 1404, violates the First Amendment to the United States Constitution which guarantees certain rights to the individual among the Rights guaranteed being those of speech and association. The primary basis of the Petitioner's claim is that this statute violates the constitutional guarantee of freedom of speech. This Court has repeatedly held this right to be absolute except in certain well defined and oft repeated situations. Petitioner respectfully submits to the Court that this statute does not remotely fall within any of the previously well defined limitations.

The only conduct penalized and made unlawful is speech. The speech proscribed can in no way be con-

strued to be an offense in and of itself. To represent a substance to be narcotic when in fact it is a non-narcotic is not a breach of peace. Nor is such a representation an assault. Petitioner does not argue that a legislature does not have the authority to prohibit the possession or sale of a narcotic drug. Such laws are clearly within the realm of the police powers of each State Legislature. However, this statute does not penalize such conduct. This statute makes the intentional or unintentional misrepresentation that a substance is narcotic when it is in fact non-narcotic a felony. In other words, this statute makes an intentional or unintentional representation a felony. It classifies unsworn verbal communication a criminal offense. Petitioner is unaware of any statute, either State or Federal, which makes it clear to lie to another individual where no breach of peace or assault occurs as a result of the words spoken.

An exhaustive search of the laws of each State of the United States reveals that no similar statute exists. No similar statute dealing with narcotics or non-narcotic representation or misrepresentation exists. The Uniform Narcotic Drug Act does not contain any reference to a law such as Illinois Revised Statute, 1977, Chap. 56-1/2, Sec. 1404.

Petitioner respectfully submits that this Court should consider the case because of the fundamental liberties granted by the First Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, petitioner submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN B. ROE
Attorney at Law
P.O. Box 68
Rochelle, IL 61068
(815) 562-8754

Attorney for Petitioner

DON KNUCKEY

State's Attorney
Marshall County Courthouse
Lacon, IL 61540
(309) 364-2440

Counsel for Respondent
Counsel for Respondent

APPENDIX A

OPINION OF THE APPELLATE COURT

(Filed June 30, 1977)

Stouder, J.

After a bench trial the defendant, Lyle Kent, was found guilty of delivery of a substance represented to be a controlled substance in violation of Ill. Rev. Stat. 1975, ch. 56-1/2, par. 1404. The circuit court of Marshall County sentenced the defendant to a term in the penitentiary of 1 to 3 years.

On this appeal the defendant raises two issues. First, defendant argues the trial court did not properly interpret the statute which the defendant was charged with violating and second, even if the statute was properly interpreted, the evidence was insufficient to support his conviction.

On March 19, 1975, Carl Roberts, Kevin Harris, John Weger and Randy Longman played hooky from school. Instead of attending school, they played pool in Henry, Illinois. Around noon, they met Kevin Harris' sister, Debbie Wiese, who drove them to a trailer in Crescent Mobile Home Park. At the trailer park, Carl Roberts gave Debbie Wiese money to purchase drugs. She went inside a trailer all alone and returned with a package which she gave to Carl Roberts. She testified that Lyle Kent, the defendant, had sold this to her, and told her it was LSD. No other witness testified to corroborate the testimony of Debbie Wiese. This package was variously described as an envelope with white

paper inside, a white piece of paper with erratic pencil markings, a blotter, and aluminum foil.

The four boys were then driven back to Henry by Debbie Wiese. Two of the boys went inside the local hotel and two went down to the river. Later all four rejoined and went to Randy Longman's house, from there to a nearby summer home, and then to Deitsch's pasture, which was near the summer home. The boys later split up and went their own ways.

On the same day, Officer Arnold Parker met Deitsch pursuant to a radio call from Chief Glen Killen of the Henry Police. Deitsch led Officer Parker to his pasture where a young boy was observed among the horses requesting to be kicked. The boy was later identified as John Weger. Weger, who was described as incoherent and uncontrollable, was taken to a Peoria hospital for treatment.

At a bench trial before the Marshall County circuit court Lyle Kent was found guilty. The defendant introduced no evidence at this trial.

So far as the evidence is concerned, it is undisputed that no effort was made to chemically identify the substance represented as LSD. It also appears undisputed that the substance delivered was considered to be the substance represented.

Defendant was charged with the violation of Illinois Revised Statutes 1975, ch. 56-1/2, par. 1404 which provides:

"Except as authorized by this Act, it is unlawful for any person knowingly to deliver or possess with intent to deliver any substance

which he represents to be a controlled substance. Any person who violates this Section is guilty of a Class 3 felony. The fine for violation of this section shall not be more than \$15,000.00."

This section became effective in 1971 when the legislature adopted the Uniform Controlled Substances Act. This Act also repealed the Uniform Narcotic Drug Act then in effect. Ill. Rev. Stat. 1969, ch. 38, pars. 22-1 thru 22-49.

Section 38 of the Uniform Narcotic Drug Act provides in pertinent part:

"Whoever agrees *** to unlawfully sell *** any narcotic drugs to any person *** and then sells *** any non-narcotic liquid, substance or material shall be imprisoned ***" Ill. Rev. Stat. 1969, ch. 38, par. 22-40.

Although no cases have reached our courts of review interpreting and applying section 404 (Ill. Rev. Stat. 1975, ch. 56-1/2, par. 1404), the defendant argues it should be given the same meaning and construction as section 38, the section repealed by the Uniform Controlled Substances Act in 1971.

A violation of section 38 consists of three elements. First, an offer to sell a narcotic drug; second, the sale of a non-narcotic substance and third, knowledge on the part of the defendant that it was a non-narcotic substance being sold. People v. Steele, 22 Ill. 2d 142, 174 N.E. 2d 848; People v. Harris, 19 Ill. App. 3d 531, 311 N.E. 2d 789; People v. Bratu, 123 Ill. App. 2d 92, 259 N.E. 2d 598 and People v. Ortega,

82 Ill. App. 2d 49, 226 N.E. 2d 426.

We agree that in this case evidence is lacking that the substance delivered was either a non-controlled substance or that such fact was known to the defendant. If the prosecution had been commenced under prior section 38, the deficiencies in the evidence would preclude conviction of violation of that statute. The question that remains is whether section 404 is a reinactment of the prior existing section or whether it describes a new offense. In our opinion section 404 does describe a new offense with different elements than prior section 38.

As a preliminary observation, we note section 404 is a special provision adopted by Illinois and was not included in the Uniform Act. The provision appears to be unique since we are unaware of its adoption in any other state, whether in those states which have adopted the Uniform Controlled Substances Act or those in which the Act is not in effect. The rules for determining legislative intent are discussed at length in People v. Dednam, 55 Ill. 2d 565, 304 N.E. 2d 627 as an aid in determining legislative intent. The evil to be remedied and the purpose to be obtained are important considerations. There can be little doubt but that the Uniform Controlled Substances Act is generally designed to prevent trafficking (sic) in controlled substances.

Defendant insists that section 38, the prior section, was designed to apply to the situation where a seller being suspicious that his prospective buyer might be a narcotics agent decided to try him out or fool him. This is the situation presented in such cases as People v. Steele, 22 Ill. 2d 142, 174 N.E. 2d 848.

As noted earlier, the language of section 404 is substantially different from that employed in the prior section. We believe this change was deliberate and represented the intention of the legislature to broaden the offenses encompassed within the prior section. We believe a violation of the section requires only that a person knowingly; one, deliver a substance and two, represents such substance to be a controlled substance. Under the language of the section it is unnecessary to prove the substance was or was not a controlled substance. Hence it is complimentary to section 401 (Ill. Rev. Stat. 1975, ch. 56-1/2, par. 1401), which requires proof of the nature of the substance delivered, i.e., that it is a controlled substance. Even though the nature of some controlled substances may be established without chemical analysis (People v. Robinson, 14 Ill. 2d 325, 153 N.E. 2d 65), in some cases no such identification is possible if the substance is unavailable for testing as in the instant case. Applying the rules of statutory construction, we hold section 404 does not require the prosecution to prove the substance delivered was a non-controlled substance.

Finally, the defendant argues he was not proved guilty beyond a reasonable doubt. Even if the People were not required to prove the substance delivered was a non-narcotic, defendant argues the testimony of Debbie Wiese concerning the representation of the substance by the defendant Lyle Kent was of such poor quality that there is a reasonable doubt of the defendant's guilt. We do not agree.

Debbie Wiese had previously been convicted of a felony and at the time of her testimony was incarcerated in the penitentiary at Dwight for that conviction. Ad-

- 16 -

mittedly, she had been told the failure to testify would have some bearing on her potential for parole, a factor which would adversely affect her credibility. Applying the rule that the testimony of a single credible witness is sufficient to support a conviction, it is our opinion the judgment of the conviction is supported by sufficient evidence. We do not find the People's evidence so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is created.

For the foregoing reasons the judgment of the circuit court of Marshall County is affirmed.

Judgment affirmed.

ALLOY, P.J. and SCOTT, J., concur.

- 16 -

mittedly, she had been told the failure to testify would have some bearing on her potential for parole, a factor which would adversely affect her credibility. Applying the rule that the testimony of a single credible witness is sufficient to support a conviction, it is our opinion the judgment of the conviction is supported by sufficient evidence. We do not find the People's evidence so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is created.

For the foregoing reasons the judgment of the circuit court of Marshall County is affirmed.

Judgment affirmed.

ALLOY, P.J. and SCOTT, J., concur.

49854

- 17 -



APPENDIX B

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD
02700

CLELL L. WOODS
CLERK

November 23, 1977

TELEPHONE
AREA CODE 217
702-2029

Mr. Lyle Kent
R. R.
Lostant, IL 61334

No. 49854 - People State of Illinois, respondent, vs. Lyle Kent, petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court

BEST COPY AVAILABLE

APPENDIX C

CHAPTER 56-1/2 - FOOD AND DRUGS

1404. Substance represented as controlled substance - Delivery or Possession - Penalty.) § 404.

Except as authorized by this Act, it is unlawful for any person knowingly to deliver or possess with intent to deliver any substance which he represents to be a controlled substance. Any person who violates this Section is guilty of a Class 3 felony. The fine for violation of this section shall not be more than \$15,000.

Amended by P.A. 77-2723, § 1, eff. Jan. 1, 1973.

APPENDIX D

Supreme Court of the United States

No. A-686

LYLE KENT,

Petitioner,

v.

ILLINOIS

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

March 22, 1978.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 15th
day of February, 1978.